PETROLEUM NASIONAL BHD

v.

KERAJAAN NEGERI TERENGGANU & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
MOHD NOOR AHMAD JCA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NOS: W-01-62-2002 & W-01-65-2002]
29 AUGUST 2003

CIVIL PROCEDURE: *Trial - Dismissal of preliminary issues - Appeal against dismissal - Whether suit by state government against corporate body and federal government for ceasing payments over petroleum obtained onshore and offshore state land involved complex legal issues - Whether determination of preliminary issues would be decisive of substantive part of suit - Whether determination also would clarify complex legal issues and result in early disposal of suit - Rules of the High Court 1980, O. 14A & O. 33 r. 2*

The plaintiff is the state government of Terengganu. The 1st defendant is a corporate body conferred with rights, powers, privileges and liberties under the Petroleum Development Act 1974 ('PDA'). The 2nd defendant is the Federal Government. By virtue of a Vesting Instrument ('VI') and a Principal Agreement ('PA') between the plaintiff and the 1st defendant, the 1st defendant acquired petroleum rights onshore and offshore Terengganu and was required to make payments in return. The 1st defendant made payments for 22 years before it stopped payment on the basis that the PA was void and *ultra vires* the PDA. That led to the plaintiff's suit against the defendants. The defendants then, by separate applications, applied before the High Court for certain proposed questions of law to be determined both under O. 14A and O. 33 r. 2 of the Rules of the High Court 1980 ('the Orders'). The learned judge dismissed the applications on the ground that the case involved a number of complex legal issues and should, therefore, proceed to trial. Hence, the appeals by the defendants to this court.

Held:
Per Mohd Noor Ahmad JCA

[1] The core or primary issue was contained in the first three questions posed in the respective application. The answers would be decisive of the main or a substantive part of the suit and would result in a substantial saving

of time and cost as it would significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper. (p 354 a-f)

[2] The plaintiff submitted that the dominant issue in the suit, ie, that the reason for the payments made by the 1st defendant for 22 years and the subsequent refusal by the 1st defendant to continue payment was not presented for a preliminary ruling. This issue was to a certain extent covered by the 3rd question of law posed herein and the legal reason for stopping payments depended on the answers to the 1st and 2nd questions. Further, the defendants pleaded that the PA under which the said payments were made, was *void* and *ultra vires* the PDA. Therefore, the questions of law posed herein were comprehensive and all embracing. (p 354 g-i)

[3] The learned judge only agreed to give the plaintiff the opportunity of calling witnesses to the extent of giving evidence as to the factual background leading to the execution of the VI and PA. The law applicable to the interpretation and construction of statutes and documents in the light of facts pleaded had to be considered and s. 17A of the Interpretation Acts 1948 and 1967 requires the court to apply the purposive approach in the interpretation of the PDA. On the interpretation of the definition of the terms "continental shelf" and "off-shore land", there was no ambiguity in the legislation concerned. As such, there was no necessity for intrinsic evidence to be adduced. (pp 355 a-g & 356 g-h)

[4] The plaintiff submitted that a trial was more appropriate as the court could review the policy and intent of the PDA. However, it is not the function of the court to review the policy and intent of Parliament on any legislation but merely to interpret it in order to discover what the policy and intent of Parliament is and whether the same is consistent with the Federal Constitution. (p 357 e-f)

[5] The questions for the court to determine were whether the plaintiff had the rights to petroleum discovered offshore in the continental shelf, and whether the plaintiff had sovereign rights. These were pure legal questions based on the construction of documents, statutes, the Federal Constitution and the State Constitution of Terengganu. No intrinsic evidence was required to aid their construction. The issues of sovereignty and independence of Terengganu, its pre-historic position, its land and seas could be gathered and interpreted from the 14 Acts of Parliament referred herein and also from the agreements, conventions and other relevant

documentary sources. The issues on maritime regimes and oil explorations were not relevant and the need for expert evidence on these issues was not necessary. (p 357 g-i)

[6] The plaintiff ought to be able to adduce evidence as to the factual background leading to the execution of the VI and the PA through affidavits. However, such evidence must be restricted to what was necessary so that the record would not be bulky. The court agreed in principle the plaintiff's reliance on proviso (f) of s. 92, ss. 95, 97 and 98 of the Evidence Act 1950 to justify the need for evidence to be adduced. However, the trial judge should determine the merits of this contention. Nevertheless, it would be adequate if this evidence was adduced through affidavits and it must be solely limited to what was essential. (p 358 a-c)

[7] The merits of the defendants' application should not be impaired by the fact that affidavit evidence was allowed. The merits of the application was a separate matter altogether from the liberty of the plaintiff to adduce affidavit evidence because affidavit evidence was permissible under the Orders. (p 358 d-e)

[8] The subsequent conduct of the 1st defendant in making payments continuously to the plaintiff for 22 years after the execution of the VI and the PA was inadmissible to interpret the said documents. It was admissible only in so far as to show whether there was a contract and what the terms of the contract were, either originally or by variation or as a basis for an estoppel. (p 360 d-e)

[9] There should be no distinction between who applies and who does not apply for a determination under the Orders. In a fit case where either of the Orders apply, the reluctant party has no choice but to accept the risk and is no longer entitled to the benefit of the ordinary process of law and the right to a trial. Otherwise the objective and purpose of the Orders will be defeated. The learned judge failed to appreciate the scope and efficacy of the Orders. (p 361 a-b)

[10] Where preliminary issues in an application are disposed in advance, preparatory works for the trial may not be necessary depending on the result of the application. An early disposal of the applications would place the parties in a clearer position as to whether anything further was required in the conduct of the case. The trial of the preliminary issues or questions would further clarify the complex issues that face the court in determining the suit. However, it is within the judge's discretion

whether or not to adopt this course. If he thinks the process is cumbersome and does not serve the objective and purpose of the Orders, he is entitled to dismiss the application. (p 363 f-h)

[11] The court did not agree with the manner in which the learned judge arrived at his conclusions and findings that this case was far from being plain and simple because it involved a number of complex legal issues. He did not identify and make proper appraisal of the material facts pleaded. His consideration on the matter was inadequate, incomplete and unsustainable. Hence, his exercise of discretion was incorrect. (p 364 b-d)

[Appeals allowed with costs. Case remitted to the High Court for an early hearing.]

*[**Bahasa Malaysia** translation of headnotes*

Plaintif adalah kerajaan negeri Terengganu. Defendan pertama adalah pertubuhan perbadanan yang diberikan hak, kuasa, dan keistimewaan di bawah Akta Kemajuan Petroleum 1974 ('AKP'). Defendan kedua adalah Kerajaan Persekutuan. Di bawah satu suratcara letakhak 'Vesting Instrument' ('VI'), dan satu perjanjian utama 'Principal Agreement' ('PA'), di antara plaintif dan defendan pertama, defendan pertama memperolehi hak ke atas petroleum yang didapati di daratan dan lepas pantai negeri Terengganu dan sebagai balasan defendan pertama diperlukan membuat pembayaran. Seterusnya, defendan pertama membuat pembayaran selama 22 tahun sebelum memberhentikannya atas alasan bahawa PA terbatal dan *ultra vires* AKP. Ini membawa kepada guaman plaintif terhadap defendan-defendan. Defendan-defendan pula, melalui permohonan masing-masing di hadapan Mahkamah Tinggi mengemukakan beberapa soalan undang-undang untuk ditentukan di bawah A. 14A dan A. 33 r. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Aturan-Aturan tersebut'). Hakim bijaksana menolak permohonan-permohonan tersebut atas alasan bahawa kes ini melibatkan banyak isu undang-undang yang kompleks dan dengan itu patut diteruskan untuk perbicaraan. Maka, rayuan-rayuan defendan ini.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Isu terpenting terkandung di dalam ketiga-tiga soalan yang mula-mula dikemukakan di dalam permohonan masing-masing. Jawapan kepada soalan-soalan tersebut akan menentukan sebahagian utama atau substantif kes ini. Ini akan menjimatkan masa dan kos terutamanya dalam penyediaan pra-perbicaraan atau perbicaraan seterusnya.

[2] Plaintif membentangkan bahawa isu yang paling mustahak dalam guaman ini tidak dikemukakan terdahulu untuk penyelesaian iaitu kenapa defendan pertama membuat pembayaran selama 22 tahun dan kemudiannya enggan untuk meneruskannya. Mahkamah berpendapat bahawa soalan ketiga telah pun meliputi isu ini dan alasan undang-undang bagi defendan pertama memberhentikan pembayaran tersebut mestilah bergantung kepada jawapan soalan pertama dan kedua. Lagipun, defendan-defendan memplidkan bahawa PA di bawah mana pembayaran dibuat, adalah terbatal dan *ultra vires* AKP. Dengan itu, soalan undang-undang yang dikemukakan adalah padat dan merangkumi semua isu-isu berkenaan.

[3] Hakim bijaksana hanya bersetuju memberi plaintif kesempatan memanggil saksi-saksi setakat memberi keterangan fakta kepada latar belakang penyempurnaan VI dan PA. Undang-undang yang terpakai kepada pentafsiran statut dan dokumen memandangkan fakta-fakta yang diplidkan mesti dipertimbangkan dan s. 17A Akta Tafsiran 1948 dan 1967 memerlukan mahkamah untuk menggunakan pendekatan yang purposif dalam pentafsiran AKP. Dalam pentafsiran definasi terma-terma "continental shelf" dan "off-shore land", tiada ketaksaan dalam undang-undang berkenaan.

[4] Plaintif menghujahkan bahawa perbicaraan adalah lebih sesuai kerana mahkamah boleh mengkaji semula polisi dan maksud AKP. Ianya bukanlah tugas mahkamah untuk mengkaji semula polisi dan maksud Parlimen atas mana-mana undang-undang. Mahkamah hanya diperlukan untuk mentafsirkannya bagi mengetahui polisi dan maksud Parlimen sahaja dan sama ada ia konsisten dengan Perlembagaan Persekutuan.

[5] Soalan-soalan yang dikemukakan untuk ditentukan oleh mahkamah adalah sama ada plaintif mempunyai hak ke atas petroleum yang dijumpai lepas pantai di dalam pelantar benua, dan sama ada plaintif mempunyai hak kedaulatan berkenaannya. Ini adalah soalan undang-undang berasaskan pentafsiran dokumen-dokumen, statut-statut, Perlembagaan Persekutuan dan Perlembagaan Negeri Terengganu. Tiada keterangan intrinsik yang diperlukan untuk membantu pentafsiran tersebut. Isu-isu kedaulatan dan kemerdekaan Terengganu, kedudukan pra-sejarahnya, daratan dan kelautannya boleh diperolehi dan ditafsirkan daripada 14 Akta-Akta Parlimen yang dirujukkan di sini dan juga daripada perjanjian-perjanjian, konvensyen-konvensyen dan sumber dokumentari lain yang berkenaan. Isu-isu rejim kelautan dan penyelidikan minyak tidak beberapa penting dan keterangan pakar tidak diperlukan berkenaannya.

[6] Plaintif boleh mengemukakan keterangan fakta kepada latar belakang penyempurnaan VI dan PA melalui afidavit. Tetapi keterangan seperti tersebut patut dihadkan kepada apa yang perlukan supaya rekod tidak terlalu banyak. Mahkamah bersetuju atas prinsip penghujahan plaintif bahawa proviso (f) s. 92, ss. 95, 97 dan 98 Akta Keterangan 1950 menunjukkan bahawa keterangan mesti dikemukakan. Tetapi merit penghujahan itu patut ditentukan oleh hakim bicara. Namun demikian, ianya mencukupi jika keterangan ini dikemukakan melalui afidavit dan ianya mesti dihadkan kepada apa yang diperlukan.

[7] Merit permohonan defendan-defendan tidak mesti dilemahkan oleh fakta bahawa keterangan afidavit dibenarkan. Merit permohonan langsung sekali merupakan perkara yang lain daripada kebebasan plaintif mengemukakan keterangan afidavit kerana keterangan afidavit boleh diterima di bawah Aturan-Aturan tersebut.

[8] Tindakan kemudian plaintif membuat pembayaran seterusnya selama 22 tahun selepas penyempurnaan VI dan PA tidak boleh diterima pakai untuk tafsiran dokumen-dokumen tersebut. Ia hanya boleh diterima pakai setakat untuk menunjukkan sama ada terdapatnya satu kontrak dan apa terma-terma kontrak tersebut, iaitu dalam asalnya, melalui variasi atau sebagai alasan bagi estoppel.

[9] Tidak ada perbezaan di antara siapa yang memohon dan siapa yang tidak memohon untuk penentuan di bawah Aturan-Aturan tersebut. Dalam kes di mana salah satu daripada Aturan-Aturan ini terpakai, pihak yang keberatan tidak ada pilihan lain tetapi menerima risikonya dan tidak berhak untuk perbicaraan. Jika tidak tujuan dan objektif Aturan-Aturan tersebut tiada bermakna lagi. Hakim bijaksana gagal untuk menilaikan lingkungan dan kepentingan Aturan-Aturan tersebut.

[10] Di mana isu-isu permulaan diselesaikan terdahulu, kerja-kerja persiapan bagi perbicaraan mungkin tidak diperlukan bergantung kepada akibat permohonan itu. Satu penyelesaian awal permohonan-permohonan akan meletakkan pihak-pihak dalam kedudukan yang jelas, iaitu sama ada atau tidak mereka perlu mengambil tindakan selanjutnya dalam pelaksanaan kes. Perbicaraan isu-isu permulaan akan lebih menjelaskan isu-isu kompleks yang berhadapan mahkamah bagi penentuan sesuatu guaman itu. Tetapi, ianya adalah di dalam budi bicara hakim sama ada beliau hendak mengikuti arah tersebut. Kalau beliau berpendapat bahawa proses itu menyusahkan dan tidak memenuhi tujuan dan objektif Aturan-Aturan tersebut, maka beliau berhak untuk menolak permohonan itu.

[11] Mahkamah tidak bersetuju dengan cara hakim bijaksana menyimpulkan bahawa kes ini tidak jelas dan mudah tetapi melibatkan isu undang-undang yang kompleks. Beliau tidak menilaikan fakta-fakta penting yang diplidkan. Penimbangannya atas perkara ini tidak mencukupi, tidak lengkap dan tidak boleh dipertahankan. Maka, budi bicara yang digunakannya adalah tidak betul.

Rayuan-rayuan dibenarkan dengan kos. Kes diremit ke Mahkamah Tinggi untuk pembicaraan awal.]

Case(s) referred to:

Ahmad Tajuddin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Allen v. Gulf Oil Refinery Ltd (CA) [1980] 1 QB 156 ***(refd)***

Allen v. Gulf Oil Refinery Ltd [1981] AC 1001 ***(refd)***

Ata Management Sdn Bhd v. Makmuran Sdn Bhd [1999] 191 MLJ U ***(refd)***

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627 SC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Cow v. Casey [1949] 1 KB 474 ***(refd)***

E (A Minor) v. Dorset County Council, x (Minors) v. Bedforshire County Council [1995] 2 AC 633 ***(refd)***

Egerton v. Jones [1939] 2 KB 702 ***(refd)***

Evans v. Bartlam [1937] AC 473 SC ***(refd)***

Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511 SC ***(refd)***

Guna Sittampalam & Anor v. Aik Hua Properties Sdn Bhd [1989] 2 MLJ 162 ***(refd)***

Hadmor Production Ltd v. Hamilton [1983] 1 AC 191 ***(refd)***

Huang Ee Hoe v. Tiong Thai King [1991] 2 MLJ 51 ***(foll)***

ICS v. West Bromwich BS [1998] 1 All ER 98 ***(refd)***

James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583 ***(foll)***

Jolley v. Sutton London Borough Council (HL) [2000] 1 WLR 1082 ***(refd)***

Kamla Lal Hiranand v. Harilela Padma Hari & Ors [2000] 3 SLR 696 ***(foll)***

Keng Huat Film Co Sdn Bhd v. Makhanlal (Properties) Pte Ltd [1984] 1 MLJ 243 FC ***(refd)***

Korso Finance Establishment Anstalt v. John Wedge (unreported, 15 Feb 1994, CA Transcript No. 14/387 ***(refd)***

L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235 ***(foll)***

Lin Nyuk Chan v. Wong Sz Tsin [1964] MLJ 200 ***(refd)***

Mewah Plus Property Sdn Bhd v. KLuang Disrict Government Servants Co-Operative Housing Society Ltd [2000] 2 CLJ 236 CA ***(refd)***

Microsoft Corporation & Ors Summit Holdings Ltd & Anor And Other Appeal [1999] 4 SLR 529 ***(foll)***

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading [1992] 1 MLJ 185 SC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781 SC ***(refd)***
Palaniappa Chettiar v. Sithambaram Chettiar & Ors [1982] 1 MLJ 186 ***(refd)***
Payna Chettiar v. Maimoon Ismail & Ors [1997] 3 SLR 387 ***(foll)***
Pooley v. Driver [1877] 5Ch D 458 ***(refd)***
Prenn v. Simmons [1971] 3 All ER 237 ***(refd)***
Re Ringtower Holding Plc [1989] BCC 82 ***(refd)***
SC Tavener & Co Ltd v. Glamorgan County Council [1941] 57 TLR 243 ***(refd)***
Sl Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1) [1994] 1 CLJ 207 HC ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***
Sussex Caravan Parks Ltd v. Richardson (Valuation Officer) [1961] 1 All ER 731 ***(refd)***
Tien Ik Sdn Bhd & Ors v. Kuok Khoon Hwong Peter [1993] 1 CLJ 9 SC ***(refd)***
Tilling v. Whiteman [1980] AC 1 ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd [1997] 1 CLJ 463 CA ***(refd)***
Vijayalaksmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***
Watcham v. AG of East Africa Protectorate [1919] AC 533 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 92, 95, 97, 98 prov (f)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 14A, O. 14 rr. 3(b), 12, O. 18 rr. 7(1), 11, 19, O. 33 r. 2
Petroleum Development Act 1974, ss. 2(1), 4

Other source(s) referred to:
Chitty on Contract, 28th end, vol 1
The Supreme Court Practice, 1999, Vol 1 para 14A/2/5/8

For the first defendant - Dato' Cecil Abraham (Rabindra S Nathan & Rishwant Singh); M/s Shearn Delamore & Co
For the second defendant - Dato' Azahar Mohamed (Dato' Mary Lim); AG's Chambers
For the plaintiff - Tommy Thomas (Sitpah Selvaratnam & Megat S Merican); M/s Tommy Thomas

JUDGMENT

Mohd Noor Ahmad JCA:

The defendants, by separate applications, applied before the High Court, for certain proposed questions of law to be determined both under O. 14A and O. 33 r. 2 of the Rules of the High Court 1980 (the RHC). The proposed questions, as alleged, arose from the pleadings filed in Civil Suit No. S3-21-99-2001 (the Suit), instituted by the plaintiff against the defendants. The learned High Court judge dismissed the applications. Hence, these appeals.

The plaintiff is the government of a component state of the Federation of Malaysia. The 1st defendant is a body corporate incorporated under the Companies Act 1965 and conferred with the rights, powers, privileges and liberties as spelt out in the Petroleum Development Act 1974 (the PDA). The 2nd defendant is the Federal Government. By a vesting instrument of 22 March 1975 signed by the then Menteri Besar of the plaintiff (the vesting instrument), the 1st defendant was vested with the entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia (s. 2 of the PDA). And under an agreement of the same date between the plaintiff and the 1st defendant (the principal agreement) it was agreed that in return for the ownership and the rights, powers, liberties and privileges vested by the plaintiff in the 1st defendant in respect of petroleum by the vesting instrument, the 1st defendant was required to make to the plaintiff cash payment in the form of yearly sum amounting to the equivalent of 5% of the value of the petroleum won and saved in the State of Terengganu and sold by the 1st defendant, its agents or contractors. The determination and the calculation of the cash payment were elaborated and expanded in an agreement of 16 September 987 signed between the plaintiff and the 1st defendant (the supplementary agreement). Consequently, payments were made by the 1st defendant to the plaintiff from 1978 until March 2000. Thereafter, the 1st defendant stopped the payment. The stoppage triggered the plaintiff to file the suit.

Apparently, the plaintiff relies on six causes of actions against the 1st defendant, *viz*. (i) breach of contract (ii) unfair discrimination (iii) deprivation of property without compensation (iv) estoppel (v) unlawful directions/*ultra vires* and (vi) legitimate expectation, and against the 2nd defendant, *viz*. (i) *ultra vires* (ii) relevant and irrelevant consideration (iii) error of law (iv) Wednesbury unreasonableness (v) tort of inducement for breach of contract and (vi) government contracts. Against the 1st defendant, the plaintiff seeks for specific performance of the principal agreement and the supplementary agreement, an order requiring the 1st defendant within 14 days from the date of the court order, to pay to the plaintiff the arrears in respect of the cash payments due from 1 September 2000 and the sums due in the future in accordance with the terms of the principal agreement and the supplementary agreement, damages for breach of contract and general damages; and against the 2nd defendant, for general damages, aggravated damages and exemplary damages, and against both the defendants, for interest on the amount to be adjudged, costs and other reliefs.

The 1st defendant proposed the following questions of law.

1. Did the Plaintiff have any rights over petroleum won and saved in the 'continental shelf' (as defined in the Continental shelf Act 1966 ("CSA") (hereinafter "Continental Shelf") off the Plaintiff's coast up and just prior to:

   (i) the enactment of the Petroleum Development Act 1974 ("PDA)?

   (ii) the execution of the Agreement dated 22nd March 1975 between the Plaintiff and the First Defendant?

2. Did the Plaintiff vest any rights to petroleum won and saved in the Continental Shelf off the Plaintiff's coast in the First Defendant *vide*:

   (i) the "Vesting instrument"

   (ii) the Agreement dated 22nd March 1975 between the Plaintiff and the First Defendant?

3. Is the Plaintiff entitled to payment under Section 4 of the PDA in respect of petroleum won and saved in the Continental Shelf off the Plaintiff's coast?

4. Does the doctrine of estoppel apply to Petronas?

5. Has the Plaintiff any legitimate expection of continuing to receive payment from the First Defendant in respect of petroleum won and saved in the Continental Shelf off the Plaintiff's coast?.

And the proposed questions of law by the 2nd defendant are:

1. Did the Plaintiff have any rights under the law over petroleum won and saved in he 'continental shelf' (as defined under the Continental Shelf Act 1966) adjacent to the Plaintiff's coast up and just prior to:

   (i) the enactment of the Petroleum Development Act 1974?

   (ii) The execution of the Agreement dated 22 March 1975 between the Plaintiff and the first Defendant?

2. If the answer to the first question is in the negative, can the Plaintiff nevertheless validly vest any rights under the law in respect of petroleum won and saved in the 'continental shelf' (as defined under the Continental Shelf Act 1966) so as to enable the Plaintiff to receive payment in respect of the same, *vide*

   (i) the 'Vesting Instrument'?

   (ii) the Agreement dated 22 March 1975 between the Plaintiff and the First Defendant?

3. On a true and proper construction of the intent and purpose of section 4 of the Petroleum Development Act 1974, is payment due to the Plaintiff

in respect of petroleum won and saved in the 'continental shelf' (as defined under the Continental Shelf Act 1966) pursuant to the 'Vesting Instrument' and the Agreement dated 22 March 1975 entered into between the Plaintiff and the First Defendant.

Before us the learned counsel for the 1st defendant, Dato' Cecil Abraham contended that the disputes in the Suit are mainly centred on the interpretation of the provisions of the Federal Constitution, the Trengganu State Constitution, the vesting instrument, the principal agreement and the supplementary agreement, statutes and conventions mentioned in the pleadings. As such, there is no need for the court to rely on intrinsic or oral evidence for the purpose of the interpretation. The learned Senior Federal Counsel for the 2nd defendant, Dato' Azahar Mohamed to a large extent adopted the submission of the learned counsel for the 1st defendant and added that the proposed statement of agreed facts which are based on undisputed facts derived from the plaintiff's pleadings and the applicable legislations are sufficient to assist the court in determining the core issues, that is to say, whether the plaintiff has any right to petroleum in the continental shelf off the coast of Terengganu between the years 1911 and 1975. It is the contention of both the learned counsel for the defendants that the proposed questions if determined one way or the other would be decisive of the matter before the court.

The plaintiff resisted the applications on the following grounds appearing in the affidavit of Tun Dato' Dr Haji Mohd Salleh bin Abas affirmed on 24 December 2001:

(i) the pleadings are voluminous, lengthy and extensive (para 7);

(ii) the causes of action relied upon by the paintiff are exhaustive in nature (paras 8 and 9);

(iii) numerous issues of complexity are raised in the pleadings. Thus, each cause of action itself raises multiple issues of fact and law (para 10);

(iv) myriad question of law fall for determination. They include novel and difficult legal questions, some of which have never been considered by any court. Such questions cannot be answered in isolation or in a vacuum; they can only be properly determined after evidence, both documentary and viva voce, are adduced and facts emerged at the trial. Hence, it is vital for the factual matrix to evolve and develop before an attempt is made to determine legal questions (para 11);

(v) discovery of document is fundamental to this case. A review of the pleadings will indicate that this suit involves massive documentation, including historical sources pertaining to the rights and privileges of the Terengganu Government and issues of sovereignty. Justice cannot be

achieved in dealing with the documents by the short-cut method (para. 12);

(vi) having regard to the pleaded issues, it is vital that witnesses testify in the normal way in a trial and be subject to cross-examination so that the court is put in a position to make findings of fact which would then assist the court to reach conclusions on the respective cases of the three parties (para. 13);

(vii) having regard to the complex issues of fact and law, and the scale and magnitude of the cash payments, one can reasonably expect this case to go on appeal, first to the Court of Appeal and thereafter, if leave is secured, to the Federal Court. The appellate courts would be in a much better position to hear the appeals after a trial rather than a summary disposal (para. 14) and

(viii) this is a heavy commercial/constitutional case of public and national interest. It cannot be disposed off in a summary way (para 15).

The learned judge dismissed the applications on the following grounds that:

(i) the plaintiff should be given the opportunity to call witnesses to give evidence on the factual background leading to the execution of the principal agreement and the supplementary agreement. To do otherwise would tantamount to shutting the plaintiff out from presenting its case in the best possible way it chooses (@ 53 para D & 54 para B RR Jld 1);

(ii) the issues framed did not fully consider the alternative causes of action of unfair discrimination, estoppel and legitimate expectation relied upon by the plaintiff against the 1st defendant, and the alternative causes of action based on the principle of *ultra vires*, error of law, relevant and irrelevant considerations and Wednesbury unreasonableness relied upon by the plaintiff against the 2nd defendant. On these issues it is necessary for the plaintiff to adduce oral evidence in support of its claim (@ 54 para CD and @ 55 para A RR Jld 1). On unfair discrimination, he relied on the Court of Appeal decision in *Ahmad Tajuddin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225 (on what is unfair discrimination, what the sufferer has to prove in order to succeed, type of injuries suffered and on the need of the decision maker to act fairly and reasonably where a person's livelihood or reputation is adversely affected by the decision) to hold that the plaintiff may need to call witnesses to support its claim that the 1st defendant had unfairly discriminated against the plaintiff, and also to show how far reaching the effect of the defendants' action on the plaintiff (@ 55 para B-D and @ 56 para A-D RR Jld1);

(iii) O. 14A and O. 33 r. 2 applications should only be used in clear and simple cases. He referred to the cautionary words of Lord Wilberforce in *Allen v. Gulf Oil Refinery Ltd* [1981] AC 1001 @ 1010 and to a similar sentiment expressed by our Supreme Court in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781 and to the strong reservation in adopting the procedure of allowing preliminary points to be taken as expressed by Lord Wilberforce in *Tilling v. Whiteman* [1980] AC 1. Then, he concluded that having considered the pleadings and the submissions of the parties he found this case is far from being plain and simple because it raised a number of complex legal issues involving, *inter alia*, the interpretation and construction of the Federal Constitution and the State Constitution, International Conventions, the PDA and a number of other statutes (@ 56 para E to @ 59 para D RR Jld.1) and

(iv) the parties thus far failed to come to an agreement on the facts relevant to the issues before the court (@ 59 para D RR Jld1).

The defendants mounted their attack on the judgment of the learned judge with a total of 36 grounds (see the respective Memorandum of Appeal @ 8 to @ 11 and @ 20 to @ 25 RR Jld 1). The attack is targeted not only against the four grounds based by the learned judge to dismiss their applications but also on the failures or omissions of the learned judge to consider or really consider certain matters relating to the core issues, collateral issues, the scope and the applicability of O. 14A and O. 33 r. 2, the distinction between the principles applicable in O. 14A and O. 33 r. 2 applications, the defences, the admissions and disputes based on the pleadings and the concession made by the defendants as deposed in the affidavits. To a great extent the grounds overlap each other. And the four grounds on which the learned judge based his decision may be classified as matters relating to the need for the plaintiff to call witnesses, the non-inclusion of the plaintiff's alternative causes of action in the questions framed, the complexity of the case and the non-agreement of the parties on the relevant facts. Our focus will be on those four grounds. As a preview, a scrutiny of the judgment of the learned judge reveals that the allegations of the defendants on the aforesaid failures or omissions of the learned judge are to a certain extent real and valid.

We have to consider the scope and efficacy of O. 14A. The Order was introduced into the RHC by PU(A) 342/2000. Its purpose is to expedite the disposal of an action at interlocutory stage in order to save costs and time. It was adopted from the English equivalent with some modifications. Our O. 14A reads:

(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in

any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the court under O. 18 r. 19, or any other provision of these rules.

And the English O. 14A of the Rules of the Supreme Court states:

(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The court shall not determine any question under this Order unless the parties have either:

(a) had an opportunity of being heard on the question, or

(b) **consented to an order or judgment on such determination.**

(4) The jurisdiction of the court under the Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of the court under O. 18 r. 19 or any other provision of these rules. (Emphasis added).

In a nutshell, the Order enables the court to determine any **question of law or construction of document** where it appears to the court that **such question is suitable for determination without the full trial** of the action and **such determination will finally determine the entire cause** or **matter** or **any claim** or **issue** therein. The Order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of O. 14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our O.14A. In *Korso Finance Establishment Anstalt v. John Wedge* (unreported, 15 Feb 1994, CA Transcript No. 14/387), the English Court of Appeal laid down the following principles on the ambit of O. 14A:

1. An issue is "a disputed point of fact or law relied on by way of claim or defence".

2. A question of construction is well capable of constituting an issue.

3. If a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

4. Respondents to an application under O. 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application. (see The Supreme Court Practice 1999 Vol 1 para. 14A/2/5).

In the same case it was held:

> In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter ...
>
> **The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.**
>
> The real question in this case at the end and really crucial one it seems to me is: **will the court be able to dispose of the case or the major part of the case or the most significant issue in the case under O. 14A dealing with the matter today**. (@ 17C of the Transcript).

Clearly one would prefer the facts to have been simpler, **but the fact that they are complicated does not rule out the use of the Order. (@ 7 of the Transcript)**.

In my judgment, having rightly decided that the issue could properly be disposed of without evidence and discovery, if he decided on the side of the plaintiffs, it would determine the action. In any event the question of construction was a dominant feature of the case, and the Judge ought to have proceeded to determine that issue. The postscript to his judgment, which refers to the desirability of the parties, as the Judge put it, 'having their day in Court,' should have been tempered by the reflection that Order 14 A has lately been provided to avoid that expense and to assist parties in the efficient disposal of their actions. (@ 8 of the Transcript).

(Emphasis added).

This position was followed by the Singapore Court of Appeal and the High Court when dealing with O. 14 r. 12 of the Rules of Court, our equivalent of O. 14A, which recognized that resort to the procedure can be made to even where it does not dispose of the entire cause or matter (re *Payna Chettiar v. Maimoon Ismail & Ors* [1997] 3 SLR 387; *Microsoft Corporation & Ors Summit Holdings Ltd & Anor And Other Appeal* [1999] 4 SLR 529 and *Kamla Lal Hiranand v. Harilela Padma Hari & Ors* [2000] 3 SLR 696). Order 14A should be read, *inter alia*, with O. 14 (summary judgment) and O. 18 r. 19 (striking out pleadings and endorsements) (re *The Supreme Court Practice 1999* vol 1, para 14A/0/2) and O. 14A r. 1(5) of both our Order and the English Order provide that nothing in the Order shall limit the powers of the court under O. 18 r. 19.

The principles established in the cases cited are of great persuasive force as they deal with similar provision of the civil procedure. Hence, we are inclined to follow them.

Order 33 r. 2 of the RHC states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v. Sithambaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, that could conclude the whole proceedings and it would be unnecessary to try the other issues. In *Sl Rajah & Anor v. Dato' Mak Hon Kam & Ors* (No. 1) [1994] 1 CLJ 207, Lim Beng Choon J, after considering a large number of authorities on the ambit of O. 33 r. 2 and its equivalent, stated that before

deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations:

(a) As a general rule the Court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.

(b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(c) Preliminary points of law have been described as too often of so-called issues of fact, the justification is even harder to discern.

(d) A preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

Those are the applicable principles to an O. 14A application and to the alternative application made pursuant to O. 33 r. 2. However, the outcome of their applications will depend very much on the facts of each case.

From the pleadings, we are satisfied that the core or primary issue in the Suit is whether the plaintiff has, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu. The plaintiff contends that petroleum rights, whether onshore or offshore are part of land rights, which are vested exclusively to the plaintiff under the Federal Constitution (paras 10 and 11 of the statement of claim). This is the crux of the plaintiff's claim. The plaintiff pleads that pursuant to the PDA the vesting instrument and the principal agreement were signed whereby the plaintiff voluntarily relinquished to the 1st defendant the ownership of all petroleum lying onshore or offshore of Terengganu in return for the cash payments. On the contrary, the defendants assert that the plaintiff's right over petroleum is limited to three nautical miles off the coast of Terengganu and whereas the rights over petroleum in the continental shelf remained with the 2nd defendant and the payments made by the 1st defendant to the plaintiff in respect of petroleum won and saved in the continental shelf of Malaysia are to be regarded as 'wang ehsan' because the principal agreement is void and of no legal effect being *ultra vires* the PDA. There is no dispute that the petroleum won and saved all this while is in the continental shelf. In the reply to the defence, the plaintiff denies that its rights to petroleum is limited to three nautical miles and asserts that its sovereign rights over petroleum either onshore or offshore remained notwithstanding the agreements to join the Federation of Malaya and Malaysia, and the plaintiff vested its rights to the 1st defendant only upon the execution of the vesting instrument and the principal agreement.

The core or primary issue is contained in the first three questions posed in the respective application. The three questions are identical though couched in different form. They are clearly defined and the plaintiff does not complain about them. The first question is whether the plaintiff has any right over petroleum in the continental shelf prior to the enactment of the PDA and the execution of the principal agreement. The second question is whether the plaintiff vested any right to petroleum won and saved in the continental shelf of the coast of Terengganu in the 1st defendant pursuant to the vesting instrument and the principal agreement. And, the 3rd question is whether the plaintiff is entitled to the payment as stipulated in the principal agreement. The extra two questions posed by the 1st defendant are subsidiary issues and are also clearly defined. No doubt, all the questions are purely questions of law. Logically, if the answer to the first question is in the plaintiff's favour, the answers to the second and third questions should also be in the plaintiff's favour. Hence, the answers will be decisive of the main or a substantive part of the suit. Therefore, what remains to be done is the determination of liability in damages and its assessment, if any, against the defendants since each of the defendants had made a concession not to contest the plaintiff's claim should the questions be answered in the plaintiff's favour (see para. 6 of Dato' Azhar Mohamed's affidavit in reply affirmed on 11 February 2002 and para. 16 of Mohd Azhar Osman Khairuddin's affidavit in reply affirmed on the same date). However, we would like to emphasise here that our decision on these appeals will not be influenced by the concessions made. On the other hand, if the answer to the first question is against the plaintiff, the subsequent two questions will suffer the same fate and consequently, its action is doomed to fail because without the said right it had nothing to vest in the 1st defendant and hence, is not entitled to the payments under the principal agreement. Therefore, the determination of the threshold issue as preliminary issues will be decisive of the whole litigation or essentially the main part of the suit. Thus, resulting in a substantial saving of time and cost as it will significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper.

But the learned counsel for the plaintiff, Encik Tommy Thomas submitted that one critical or dominant issue in the suit is the reason for the payments made by the 1st defendant for 22 years and the subsequent refusal by the 1st defendant to continue payment and that issue has not been presented for a preliminary ruling. To our mind, that issue is to a certain extent covered by the 3rd question of law posed and the legal reason for the stoppage of the payments must necessarily depend on the answers to the 1st and the 2nd questions, and further, the defendants pleaded that the principle agreement under which the payments were made for 22 years is void and of no legal effect being *ultra vires* the PDA. Therefore, the questions of law posed are comprehensive and all embracing.

The plaintiff insists on calling witnesses to testify in the normal way in a trial and be subject to cross-examination so that the court is put in a position to make findings of fact which would then assist the court to reach conclusions on the respective cases of the parties and it would also benefit the appellate court. The learned judge agreed to it only to the extent of giving the plaintiff the opportunity to call witnesses to give evidence as to the factual background leading up to the execution of the vesting instrument and the principal agreement. On this issue we have to consider the law applicable to the interpretation and construction of statutes and documents in the light of the facts pleaded. To begin with, let us set out certain established parameters within which the issue is to be considered. As O. 14 A is to be read with O. 18 r. 19 of the RHC it is proper to cite what was said by Sir Thomas Bingham MR in *E (A Minor) v. Dorset County Council, x (Minors) v. Bedforshire County Council* [1995] 2 AC 633 @ 693 HL to the effect that applications of this kind are fought on the ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to the plaintiffs if orders to strike out are indeed made only in plain and obvious cases. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleadings) the actual facts the claim is bound to fail for want of cause of action, there is no reason why the parties should be required to prolong the proceedings before that decision is reached. The court is of course bound to approach each pleaded cause of action separately, and need not reach the same decision on each. One of the principles established in *Korso Finance Establishment Anstalt v. John Wedge, supra* is that the respondents to an application under O. 14A are not entitled to contend that they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which the court should take account in construing the document, they must be taken to have known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application.

Having laid out the parameters, let us proceed with the law on this issue. Section 17A of the Interpretation Acts 1948 and 1967 requires the court to apply the purposive approach in the interpretation of any provision of an Act. We are of the view that the relevant statutes, especially the PDA call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment (re *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511). With regard to seeking the intention of Parliament the correct approach is to ascertain the meaning of the words employed by

Parliament rather than the intention of Parliament (re *Muhammed Hassan v. PP* [1998] 2 CLJ 170).

The learned counsel for the plaintiff contended that the plaintiff is entitled to tender oral evidence to establish many of the disputed facts, such as sovereignty, territory and territorial waters. He premised the argument on the basis that (i) the fourteen Acts of Parliament, agreements and conventions identified by the defendants, that is to say, the source of laws and rights are inexhaustive, (ii) the conduct of the parties, their concession, the circumstances giving rise to the various Act of Parliament and the mischief they intend to address must be examined since the policy and intent behind a statute can be reviewed but not limited in source to the Hansard and (iii) an ambiguity, in particular, in the principle agreement had arisen solely by virtue of the position taken by the defendants some 25 years after its execution and some 22 years after making the payments by the stoppage. As such, that ambiguity may be resolved by looking at the background leading to its signing, and the intention of the parties, at the time of the contract, remains relevant to their choice of words. He relied on Lord Hoffman's statement in the House of Lords' case of *ICS v. West Bromwich BS* [1998] 1 All ER 98 @ 114 & 115 and on the provisions of ss. 92 proviso (f), 95, 97 and 98 of the Evidence Act 1950 (the 1950 Act). Amongst the evidence required by the plaintiff to fortify its case are expert evidence on the issues of sovereignty and independence, maritime regimes and oil exploration, the historic position of Terengganu, its land and seas, certain terms in the recital of the principal agreement, such as 'offshore', the representations made by the defendants as alleged including the fact of payments made giving rise to estoppel and the context in which the 1st defendant made such representations as a commercial and business entity, and the conduct of the defendants giving rise to a legitimate expectation, regardless of strict legal rights.

In considering this issue, we have to bear in mind that Malaysia had acceded to the convention on the Territorial Sea and Contiguous Zone 1958 and the convention on the Continental Shelf 1958 which were superseded by the United Nations Convention on the Laws of the Sea (1982); and subsequently the municipal laws were enacted, in particular the Continental Shelf Act 1966 and the PDA. Hence, whatever terms used in the municipal laws, such as 'continental shelf' and 'off-shore land' (the continental shelf) must have been derived from the terms coined by the said conventions though need not necessarily be so. However, these terms have been so defined in the impugned legislations. In our view, there is no ambiguity in them. As such, there is no necessity for intrinsic evidence to be adduced. The learned counsel for the plaintiff referred to the term 'offshore' in the recital to the principal agreement. To our mind, the term 'offshore' appearing in the vesting instrument and the

principal agreement is definitely a statutory term. The term appears in the long title in the PDA and in s. 2(1) of the PDA. Therefore, the term is a matter for statutory interpretation, subject to established principle and doctrine. It is a cardinal rule in the interpretation of documents that the intention of the parties must be gathered from the written agreement itself. For the construction of a written agreement the established doctrine is firstly, to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly, to exclude evidence of the parties' subjective interpretations so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background, that is to say, "evidence of the background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction", have always been admissible (re *Keng Huat Film Co Sdn Bhd v. Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243 FC @ 247; per Lord Wilberforce (*per curiam*) in *Prenn v. Simmons* [1971] 3 All ER 237 @ 241 and *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282).

It was suggested by the learned counsel for the plaintiff that as there are fourteen pieces of legislation involved, a trial is more appropriate so that in the process of interpreting the legislations, in particular the PDA the court can review the policy and intent behind it, not so much as to see what was the policy and intent of Parliament at the time of enacting the PDA but to redefine that policy and intent. In our view, the suggestion is unwise and inapt. It is not the function of the court to review the policy and intent of Parliament on any legislation but merely to interpret it in order to discover what the policy and intent of Parliament is and whether the same is consistent with the Federal Constitution.

The core issue is: does the plaintiff have the rights to petroleum discovered offshore in the continental shelf? And another question for the court to determine is whether the plaintiff has sovereign rights. These are purely legal questions based on the construction of documents, statutes, the Federal Constitution and the State Constitution of Terengganu, however difficult such construction may be. As such, no intrinsic evidence is to be adduced to aid their construction. In our view, the issues of sovereignty and independence of Terengganu, its historic position, its land and seas can be gathered and interpreted from amongst the aforesaid fourteen Acts of Parliament, agreements and conventions and other relevant documentary source. The issues on maritime regimes and oil explorations are not relevant, therefore, the need for expert evidence on the issues is really unnecessary.

We agree with the learned judge in holding that the plaintiff ought to be given the opportunity to adduce evidence as to the factual background leading up to the execution of the vesting instrument and the principal agreement. However, we are of the view that, having regard to the pleadings, the agreed facts and the facts to be determined by this court as agreed facts and the then existing relevant legislations and other relevant documents, it will suffice if that evidence is adduced through affidavits. However, such evidence must be restricted only to what is necessary for the purpose so that the record will not be that bulky. We agree with the plaintiff's learned counsel's reliance on the proviso (f) of s. 92, ss. 95, 97 and 98 of the 1950 Act to justify the need for evidence to be adduced. We only agree on principle but as to the merits of his contention, that is to say, whether his contention holds water is to be subsequently determined by the learned trial judge. However, we are of the opinion that, on similar basis as aforesaid, it will be adequate if that evidence is adduced through affidavits and it must be limited solely to what is essential for the purpose.

However, in our view, the fact that affidavit evidence is allowed to be adduced on the aforesaid restricted matters for the limited purpose should not impair our consideration on the merits of the defendants' applications. The merits of the application is a separate matter altogether from the liberty of the plaintiff to adduce affidavit evidence because affidavit evidence is permissible both under O. 14A (re *The Supreme Court Practice 1999* vol 1 para 14A/2/8) and under O. 33 r. 2 of the RHC by reason that the trial of a question or issue in a cause or matter includes of fact or partly of fact as well.

Three years after the execution of the vesting instrument and the principal agreement the 1st defendant started to make the payments to the plaintiff continuously for 22 years. This is the subsequent conduct in issue. The learned counsel for the plaintiff contended that the conduct can be used to interpret the principal agreement. He relied on the decision in *Watcham v. AG of East Africa Protectorate* [1919] AC 533, where it was held that for the construction of an ambiguous title to land it was proper to have regard to subsequent acting, that is to say, subsequent possession had under the title. On the contrary, the learned counsel for the defendants asserted otherwise and cited the House of Lords' cases of *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 and other local authorities.

The majority of cases, in particular *Whitworth* and *L Schuler* held that subsequent actions are inadmissible to interpret a written agreement, although they are admissible to show whether there was a contract and what the terms of the contract were, either originally or by variation, or as the basis for an estoppel (see also *Chitty on Contracts* (28th edn, vol 1). The decisions of the

House of Lords in the two cases had been applied by our courts (re *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779 CA affirmed by the Federal Court; *Mewah Plus Property Sdn Bhd v. Luang Disrict Government Servants Co-Operative Housing Society Ltd* [2000] 2 CLJ 236 CA and *Ata Management Sdn Bhd v. Makmuran Sdn Bhd* [1999] 191 MLJ U @ 1]. However, the decision in *Watcham* case has not received general acceptance by our courts. Other than the decisions in (i) *Lin Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 200 and (ii) *Guna Sittampalam & Anor v. Aik Hua Properties Sdn Bhd* [1989] 2 MLJ 162, subsequent Malaysian decisions have not referred to *Watcham* but have applied L Schuler. It is to be noted that case (i) was decided in 1964 beforeL Schuler and Whitworth were decided and in case (ii) the court's attention was not drawn to L Schuler. The English Court of Appeal did not apply *Watcham* in *Sussex Caravan Parks Ltd v. Richardson (Valuation Officer)* [1961] 1 All ER 731 where Harman LJ stated:

> I only wish by way of caveat to say that *Watcham v. A.G.* of **East Africa Protectorate**, to which counsel for the valuation officer called our attention, **has long been under suspicion of the gravest kind from real property lawyers.** (Emphasis added).

Watcham has been expressly disapproved by the House of Lords in *L Schuler* Each of the lawlords in the case refused to apply *Watcham* and instead warned against reference to 'subsequent actings' in the construction of document:

> ... Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing lights on its meaning. I would therefore reserve my opinion with regard to *Watcham*'s case but repeat my view expressed in Whitworth with regard to the general principle. (per Lord Reid @ 252 paragraphs EF).

> The arguments used in order to induce us to depart from these settled rules and to admit evidence of subsequent conduct generally in aid of construction, were fragile. They were based first on the Privy Council judgment in *Watchman v. Attorney-General of East African Protectorate* [1919] AC 533 not, it was pointed out, cited in *Whitworth*'s case. But there was no negligence by counsel or incuria by their Lordships **in omitting to refer to a precedent which I had thought had long been recognised to be nothing but the refuge of the desperate**. Whether, in its own field, namely, that of interpretation of deeds relating to real property by reference to acts of possession, it retains any credibility in the face of powerful judicial criticism is not before us. **But in relation to the interpretation of contracts or written documents generally, I must deprecate its future citation in English courts as authority**.

> In my opinion, therefore the subsequent actings relied upon should have been left entirely out of account: in saying this I must not be taken to agree that the particular actings relied on are of any assistance whatever towards one or other construction of the contract. **Indeed if one were to purse the matter the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all**. (per Lord Wilberforce @ 261 paragraphs EG and @ 262 paragraph B).
>
> *While I agree that this appeal should be dismissed, I would not be prepared to do so upon a consideration of the actings of the parties subsequent to the agreement as permitting me to infer their contractual intentions therefrom.* I think this would be contrary to the principle of *Whitworth Street Estates (Manchester) Ltd v. James Miller & Partners Ltd* [1970] AC 583. *The decision in Watchman v. Attorney-General of East Africa Protectorate [1919] AC 533 which was referred to by the learned Master of the Rolls, does not, I believe, command universal confidence… .*". (per Lord Kilbrandon @ 272 paragraphs EH).
>
> (Emphasis added).

As the decisions in *Whitworth* and *L Schuler* command popular support, we are inclined to follow them. Therefore, we conclude that the subsequent conduct is inadmissible to interpret the vesting instrument and the principal agreement; however, it is admissible to show whether there was a contract and what the terms of the contract were, either originally or by variation, or as the basis for an estoppel.

No doubt that the issues framed did not fully consider the alternative causes of action relied on by the plaintiff against the defendants. And the learned judge held that it is necessary for the plaintiff to adduce oral evidence on the issues in support of its claim. In relation to this point the learned counsel for the plaintiff submitted that a distinction must be drawn between circumstances where the plaintiff applies for the determination under O. 14A and/or O. 33 r. 2 and where the defendants do so, against strenuous objection by the plaintiff. In the former, as the party bearing the burden of proof, the plaintiff chooses to discharge the burden by the procedure set out in those orders and thereby takes the risk of the limitations naturally arising from such procedure. In the latter, the plaintiff does not accept such risks and cannot be forced by the defendants to discharge the plaintiff's burden of proof through the limited process of those orders to the plaintiff's prejudice. The plaintiff having commenced a Writ action (which is not obviously frivolous), is entitled to the benefit of the ordinary process of law and the right to a trial.

With due respect, we do not agree with that submission. In our view, basically the impugned procedure is no respecter of parties but of justice. In a fit case where either of the Orders applies the reluctant party has no choice but to

accept the risk, and the party is no longer entitled to the benefit of the ordinary process of law and the right to a trial. There is no distinction between as to who applies for such determination and who has not, otherwise the objective and purpose of those Orders will be defeated and will make a mockery of the procedure. With regard to this ground of the learned judge, with due respect we do not agree with it. Clearly it demonstrates the lack of appreciation of the scope and efficacy of O. 14A and O. 33 r. 2 and the distinction between them. Under the former, the entire cause or matter need not be finally determined. It also permits any claim or issue herein to be so determined, but the question must be purely question of law or construction of document. And the latter caters not only for the question or issue of law arising in a cause or matter to be tried but also of fact or partly of fact and partly of law, and also the entire cause or matter need not be finally determined. Inspite of the similarities between the two Orders there are also differences between them otherwise the former would not have been introduced into our civil procedure. It is to be stressed that under both Orders the court can direct the question or issue to be determined or tried without the need for any party having to apply for it and the court may on its own frame or reframe the question or issue for the purpose or recast the question or issue proposed by the applicant or subtract therefrom or add thereto other question or issue. These can be gathered from the provisions of the Orders itself. It is manifestly evident that the court has a wide discretion on the matter. What more in this case, where the applications are pitched under both Orders, the playing field within which for the learned judge to exercise his discretion is even wider. As we have said earlier, the first three questions posed by the defendants are issues of law which will determine the core or primary issue in the suit whether the plaintiff has, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu to be entitled to the payment under the principal agreement, the determination of which by the court will result in either of the alternatives as aforesaid in para. 9(2). With that factor in mind, what ought to have been done by the learned judge, not as a matter of choice but in the exercise of discretion, is, at the outset, to scrutinize the pleadings to discover what material facts are not obviously in dispute, what facts the parties may agree after discussion and submission, with variation or otherwise and as the last resort to compel either party or both to accept the material facts, which the court thinks obviously should not be disputed. In our view, the last recourse, though drastic, is proper and permissible. We say so because under our O. 14A r. 3 the caveat placed upon the court is merely to give the parties the opportunity of being heard on the question; but, there is a slight difference in the English civil procedure where under O. 14A r. 3(b) the alternative caveat placed upon the court is that the parties must consent to an order or judgment on such determination. Whatever rational behind it we are unable to

comprehend. However, the learned judge did not do as what ought to have been done. He just accepted the fact that the plaintiff did not agree to the proposed statement of agreed facts (Appendix B) as distilled by the defendants from the pleadings and the applicable legislations. Having embarked on the exercise as he ought to have done, he should consider whether the undisputed or agreed facts are comprehensive and sufficient to determine and dispose off the core or primary issues. If they are comprehensive and sufficient he ought to have allowed the questions to be determined first, either with modification or otherwise, and if the undisputed facts so discovered are also sufficient not only to cover the subsidiary issues as reflected in the two extra questions posed by the 1st defendant but also the other causes of action of the plaintiff he should proceed to frame, either with the assistance of the parties or otherwise, other questions relevant to the issues and the causes of action and add those questions to the list for determination. Under such circumstances there will be no necessity for further investigation of facts because (i) only material facts, not evidence, must be pleaded and point of law raised in the pleadings (O. 18 r. 7(1) and r. 11 of the RHC) and (ii) the plaintiff, being the respondent to an application under O. 14A is not entitled to contend that it should be allowed to hunt around for evidence or something that may turn up on discovery which can be relied upon to explain or modify the meaning of the relevant document (re *Korso Finance Establishment Anstalt v. John Wedge*, *supra*). By such exercise there should be no risk of injustice to the plaintiff if proper determination on those questions is made because the applications are fought on the ground of the plaintiff's choosing, since it may generally be assumed to plead its best case [by analogy, re statement of Sir Thomas Bingham MR in *E (A Minor) v. Dorset County Council, x (Minors) v. Bedforshire County Council, supra*]. We are fortified in our view by what was held in *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 @ 394-395 CA.

> Thirdly we are in full agreement with counsel with respect to the powers of the court under O. 33 r. 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter. *It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law.* An action may involve many disputes on the facts as well as on the law, some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.
>
> (Emphasis added).

And by what Jessel MR said in *Pooley v. Driver* [1877] 5Ch D 458 @ 460:

> ... the Court will, at the trial of an action involving questions both of law and of fact, **decide the question of law first**, if it shall appear that the decision of such question may render it unnecessary to try the question of fact.
>
> (Emphasis added).

And further, in *SC Tavener & Co Ltd v. Glamorgan County Council* [1941] 57 TLR 243, the court held that it is insufficient to sustain an objection for the respondent to the application to state that he proposes to adduce evidence on a variety of matters at the trial and the court has the discretion to determine the preliminary issues/questions on materials that appear in the pleadings or from any document referred to in the pleadings which are capable of further clarification by any evidence which could be given at the trial of the action itself. That is on the assumption that the facts so discovered are comprehensive and sufficient. However, if they are otherwise, the learned judge should consider whether on the available undisputed facts he will be in a position to determine the core or primary issue and/or some or all of the subsidiary issues and causes of action. If he is in a position to do so, he should then frame additional questions or drop or recast the questions framed as he thinks fit and proceed to determine the issues and causes of action. However, if he is not in a position to do so, he should then consider whether any question or issue of fact or partly of fact and partly of law should be tried first, although this process may result in split trials which is permissible either O. 14A or O. 33 r 2. We are fortified by what was stated by Chong Siew Fai J (as he then was) in *Huang Ee Hoe v. Tiong Thai King* [1991] 2 MLJ 51 at para. 4 to the effect that where the preliminary issues that arose in the application were disposed of in advance, preparatory works for the trial may not be necessary depending upon the result of the application. An early disposal of the present application would place the parties in a clearer position as to whether anything further needs or ought to be done in the conduct of the case. It was further held that the trial of the preliminary issues/questions would further clarify the complex issues that face the court in determining this suit. However, it is within his discretion whether or not to adopt that course and if he thinks that the process is cumbersome and does not serve the objective and purpose of the Orders, then only he is entitled to dismiss the applications. That is, in our view, the proper or judicious exercise of discretion required.

The merits and demerits of the plaintiff's causes of action were argued at great length by both parties. We decline to consider whether they can be sustained and maintained in the Suit because that will be the function and task of another forum. However, we will touch on them when we scrutinize and marshal the facts in relation to the questions posed.

On the so-called complexity of the case, in our view, the learned judge was correct in referring to the cautionary words of Lord Wilberforce in *Allen v. Gulf Oil Refinery Ltd*, *supra*, to the similar sentiment expressed in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd*, *supra* and to the strong reservation in adopting the procedure of allowing preliminary points to be taken as expressed by Lord Wilberforce in *Tilling v. Whiteman*, *supra*. There is no doubt that he was steadfast to the beacon. However, with due respect, we do not agree with the manner in which he arrived at his conclusions and findings that this case is far from being plain and simple because it raises a number of complex legal issues involving, *inter alia*, the interpretation and construction of the Constitutions, Conventions, the PDA and other statutes. He arrived at such conclusion and findings upon mere consideration of the pleadings and the submissions of the parties without identifying and making proper appraisal of the material facts pleaded which are obviously undisputed or which should not have been disputed including admissions. Had he done so he would have been able to really appreciate the facts and the magnitude of the case better and thereafter, would have arrived at an appropriate conclusion and findings. In short, his consideration on the matter is inadequate, incomplete and unsustainable. Hence, in our view, such exercise of discretion is incorrect.

The learned counsel for the plaintiff cited the cases of *Tilling v. Whiteman* [1980] AC 1; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781 and *Allen v. Gulf Oil Refinery Ltd* (CA) [1980] 1 QB 156 as precedent in support of his argument on the complexity of the case. Precedent is a valuable stabilizing influence in our legal system. But, comparing the facts and outcome of cases in this branch of the law is a sterile exercise and is a misuse of the only proper use of precedent, *viz*., to identify the relevant rule and to apply it to the facts as found (re *Jolley v. Sutton London Borough Council (HL)* [2000] 1 WLR 1082 @ 1089 para. E). The decisions in the cases cited are based on their own peculiar facts. In *Tilling v. Whiteman* the matter went up to the House of Lords on hypothetical facts. This is not the case before us. In *Newacres* v. *Sri Alam* the issue before the court was an instance of breach of fiduciary duty which required proof by extrinsic evidence (@ 478 left-hand column para. D). And in *Allen v. Gulf* the court held that the question framed was 'useless' because it does nothing to resolve the issues in the action (@ 163 para. G).

In our view, even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O. 14A and O. 33 r. 2 in relation to the questions of law posed which are clear and definite and the issues are clearcut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts

as found. There are authorities in support of the proposition that merely because an issue of law takes a little longer to determine does not mean that the court should refuse the application (see *Korso Finance Establishment Anstalt v. John Wedge*, *supra*). In *Re Ringtower Holding Plc* [1989] BCC 82 @ 84 it was held that if the applicants can satisfy the court that the petitioner's claims are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28 pages) be struck out forthwith. This case was followed in *Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd* [1997] 1 MLJ 661 where it was held @ 661 to 662 para. 1:

> What may be 'plain and obvious' to a specialist in company law may not be so to another who does not have this specialized knowledge. The standard is an objective one and implies that the perception required is that of a person who has the required expertise. **The court may strike out a claim even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action** ... .
>
> (Emphasis added).

In *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 MLJ 400 @ 401, it was held:

> Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment **merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand**. (Emphasis added).

In *Cow v. Casey* [1949] 1 KB 474 @ 481, it was held:

> The only point is, that, as everybody knows, the Rent Restriction Acts are complicated Acts. They contain a number of difficult matters and there are a number of authorities decided upon them. But it is not sufficient under an Or. 14 case to flourish the title of the Increase of Rent restriction Acts in the face of the court and say that is enough to give leave to defend. If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under Or. 14 as it has in any other case. I*t may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule, and, in my opinion, the master was perfectly right, the judge was perfectly right, and the appeal should be dismissed.* (Emphasis added).

Although the aforesaid cases are concerned with O. 18 r. 19 and O. 14 nevertheless they are relevant because O. 14A should be read with those Orders.

Legally, in O. 14A and O. 33 r. 2 of the RHC applications no party has any liberty to disagree just for the sake of disagreeing to any fact pleaded which is obviously undisputed because for the court to give indulgence to such disagreement will not only erode the efficacy but also will stultify the objective and purpose of those Orders. On that basis, we scrutinized the pleadings and the Proposed Statement of Agreed Facts (re Appendix 11), then we called upon the parties to submit on the Proposed Statement of Agreed Facts wherein certain facts, which were not agreed to previously, had been agreed to by the defendants, and finally, having considered the respective submission on the matter we decided to impose upon the parties to accept the facts which, in our considered view, having regard to the other related facts which are obviously undisputed or facts which had been agreed to by the defendants, should have been agreed to by the parties, with or without variation or reservation. Out of that exercise, we now produce three appendices, which shall be an integral part of this judgment, namely:

Appendix A - pleaded facts which are obviously undisputed.

Appendix B - pleaded facts which were subsequently agreed to by the efendants after submissions.

Appendix C - pleaded facts which are imposed on the parties as undisputed, with or without variation or reservation.

And, having scrutinized and marshalled those facts, we frame an additional question of law to cover the alleged causes of action on which the plaintiff relies to substantiate its claim, as per Appendix D.

Notwithstanding those facts as enumerated in Appendices A, B and C, the parties may, at any stage of the hearing of the applications, apply to the court for elaboration and/or inclusion of other agreed facts related to facts already pleaded or other pleaded facts which may arise out of the subsequent amendments of the pleadings, if any. In respect of Appendix C, in relation to the Notes stated therein, we are desirous that the defendants will not hesitate in agreeing to the pleaded facts which may be factually true, so that affidavit evidence will not be necessary for the trial of the issue of fact or partly of fact and partly of law under O. 33 r. 2. We make this concession in order to ensure that justice is done to the case. However, that liberty is to be subject to the constraints and limitations as dictated in this judgment relating to the matters that may be proved by affidavit evidence except that in the case of pleaded facts which are not sufficient for the purpose of determining the additional question of law (per Appendix D) affidavit evidence may be used by the parties. However, the decision whether to allow such application, if any, and to what extent it should be allowed and the nature and extend of the

affidavit evidence to be used for the limited purposes as aforesaid, is left entirely to the learned judge's discretion.

It is trite law that the function of an appellate court is one of review only. However, where the discretion has not been exercised judicially, that is to say, when the judge **has committed an error of law** or misconceived the facts or **has not given sufficient weight to the relevant considerations or the decision would result in injustice, the court can interfere** (re *Vijayalaksmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493 FC; *Tien Ik Sdn Bhd & Ors v. Kuok Khoon Hwong Peter* [1993] 1 CLJ 9 SC; *Hadmor Production Ltd v. Hamilton* [1983] 1 AC 191; *Evans v. Bartlam* [1937] AC 473 SC; *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading* [1992] 1 MLJ 185 SC and *Egerton v. Jones* [1939] 2 KB 702]. On the final analysis of the judgment of the learned judge, we are satisfied that on the aforesaid reasons, with due respect, the learned judge had not acted in consonance with well-established principles on the matter in considering the defendants' applications. Hence, we hereby interfere with the exercise of his discretion.

Therefore, the appeals are hereby allowed with costs here and below. The deposits, if any, are to be refunded. The case is remitted to the High Court for an early hearing.

APPENDIX A

(pleaded facts which are obviously undisputed)

1. The plaintiff is the Government of the State of Terengganu (para. 5).
2. On 2 November 1911, a written constitution signed by Sultan Zainal Abidin was adopted by the State of Terengganu (para. 1).
3. The State of Terengganu came under British protection under the agreement dated 22 April 1910 as amended by an agreement dated 24 May 1919 (para. 2).
4. The State of Terengganu became a member state of the Federation of Malaya under the Federation of Malaya Agreement dated 21 July 1948 (para. 3).
5. With effect from 31 August 1957, the state of Terengganu became part of a new independent and sovereign nation, Persekutuan Tanah Melayu, under the Federation of Malaya Agreement executed by the Sultan of Terengganu on 5 August 1957 (para 4).

6. With effect from 31 August 1957, the Federal Constitution became the Supreme law of the Federation of Malaya (para. 4).

7. The 1st defendant was incorporated under the Companies Act 1965 and conferred with effect from 1 October 1974, the rights, powers, privileges and liberties set out in the Petroleum Development Act 1974 (para 6).

8. By an agreement dated 9 July 1963, the Government of the Federation of Malaya agreed with the Governments of the colonies of North Borneo, Sarawak and Singapore that the latter colonies should be federated with the existing states of the Federation of Malaya in a new Federation called "Malaysia" as an independent and sovereign nation with effect from 16 September 1963. Singapore left the Federation of Malaysia on 9 August 1965 (para. 7).

9. The second defendant has from 16 September 1963 been entrusted by the provisions of the Federal Constitution with the executive authority of the Federation of Malaysia (para. 8).

10. The distribution of powers between the plaintiff on the one hand and the 2nd defendant on the other since 31 August 1957 is as demarcated in Part V1 of the Federal Constitution and the Ninth Schedule thereto, as amended from time to time (para. 9).

11. The National Land Code 1965 came into force on 1 January 1965 (para 17).

12. The Continental Shelf Act 1966 came into force in the Peninsular Malaysia on 28 July 1966 and on 8 November 1969 for Sabah and Sarawak (para 12).

13. By the provisions of s. 3 of the Continental Shelf Act 1966 all rights with respect to the exploration of the continental shelf and the exploitation of the natural resources are vested in Malaysia and shall be exercisable by the 2nd defendant (para 12).

14. The continental shelf is defined under s. 2 of the Continental Shelf Act 1966 as "the sea-bed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial waters of the States, the surface of which lies at a depth no greater than two hundred meters below the surface of the sea, or, where the depth of the super-adjacent waters admits of the exploitation of the natural resources of the said areas, at any greater depth" (para 13).

15. By the provisions of s. 4 of the Continental Shelf Act 1966 no person shall explore, prospect or bore for or carry on any operations for the getting of petroleum in the sea-bed or subsoil of the continental shelf except under and in accordance with the Peroleum Mining Act 1966 (para. 14).

16. The Petroleum Mining Act 1966 was enforced in the Peninsular Malaysia on 1 December 1966 and in East Malaysia on 8 November 1968 (para 15).

17. By the provisions of the Petroleum Mining Act 1966 applications for exploring, prospecting or mining of petroleum were to be made:

    (a) in respect of an area of on-shore land, to the Ruler or the Yang di-Pertua Negeri in which the area of on-shore land is situate; and

    (b) in respect of an area of off-shore land, to the Yang Di-Pertuan Agong (para 15).

18. The expressions "on-shore land" and "off-shore land" are defined in s. 2 of the Petroleum Mining Act 1966 to mean land which includes the foreshore and submarine area beneath the territorial waters of the States and the continental shelf, which is the sea-bed adjoining the sea-bed beneath the territorial waters respectively (para. 16).

19. The Emergency (Essential Powers) Ordinance No. 7 of 1969 came into force on 9 August 1969 [as amended by s. 4(2) of the Emergency (Essential Powers) Ordinance No. 11 of 1969] (para. 17).

20. By the provisions of ss. 3 and 4 of the Emergency (Essential Powers) Ordinance No. 7 of 1969, although the breadth of the territorial waters of Malaysia shall generally be twelve nautical miles, for the purpose of the Continental Shelf Act 1966, the Petroleum Mining Act 1966, the National Land Code and any written law relating to land in force in Sabah and Sarawak the breadth of the territorial waters shall be three nautical miles measured from low-water mark (para. 17).

21. On 24 June 1954, The North Borneo (Alteration of Boundaries) Order in Council 1954 was issued (para. 37.2(1) D1's defence & para. 48.1 of D2's defence).

22. On 24 June 1954, The North Sarawak (Alteration of Boundaries) Order in Council 1954 was issued (para. 37.2(i) D1's Defence & para. 48.1 of D2's defence).

23. The Petroleum Development Act 1974 came into force on 1 October 1974. Section 2 of Petroleum Development Act 1974 vested firstly, the entire ownership in, and secondly, the exclusive rights, power and liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether on-shore or off-shore lands of Malaysia in the 1st defendant. The said vesting shall be effective upon the execution of a vesting deed in the form contained on the Schedule to the said Act. The ownership and the exclusive rights, power, liberties and privileges so vested shall be irrevocable and shall inure for the benefit of the 1st defendant and its successors (para 18).

24. On 22 March 1975, the vesting instrument was signed by the then Menteri Besar of the State of Terengganu (para. 27).

25. On 22 March 1975, an agreement was signed between the plaintiff and the 1st defendant where it was agreed that in consideration of the vesting instrument granted by the plaintiff to the 1st defendant, the 1st defendant shall make cash payments in the form of a yearly sum amounting to the equivalent of 5% of the value of petroleum won and saved in the State of Terengganu and sold by the 1st defendant, its agents or contractors (para. 23).

26. A letter dated 16 September 1987 detailing the computation and determination of cash payments was signed by Dato' Wan Mokhtar Bin Ahmad, the then Menteri Besar of the plaintiff and Tan Sri Abdullah Bin Mohd Salleh, the then President of the 1st defendant (para 36 & 37).

27. Cash payments were made by the 1st defendant to the plaintiff between 1978 to March 2000 (para. 39).

28. At all material times, all petroleum in respect of which cash payments referred to above were made was won and obtained in the continental shelf only (para. 12.3 of D1's defence).

Note:

The paragraph mentioned in each item, unless otherwise stated, refers to the paragraph in the statement of claim.

APPENDIX B
(pleaded facts which were subsequently agreed to by the Defendants after submissions)

1. The expression "petroleum" used in any written law means any mineral oil or relative hydrocarbon and natural gas existing in its natural condition

and casing-head petroleum spirit including bituminous shales and other stratified deposits from which oil can be extracted (para. 22)

2. Clause 2 of the principal agreement provides that the said cash payments shall be paid semi-annually, that is, on or before 1st September of each year (para 24).

3. Clause 3 of the principal agreement provides that the cash payment shall continue to be payable only for so long as petroleum is obtained from the State of Terengganu, and shall not be payable if petroleum ceased to be so obtained due to whatever cause or reason; in such event no payment by way of compensation shall be payable for loss of the cash payment which would otherwise be payable thereunder (para. 25).

4. The principal agreement was executed pursuant to the provisions of ss. 2 and 4 of the Petroleum Development Act (para. 26).

5. The said Grant was executed in writing on 22 March 1975 by Dato' Wan Mokhtar bin Ahmad, the then Menteri Besar of Terengganu, acting on behalf of the Terengganu State Government, which grant was accepted in writing by Tengku Razaleigh Hamzah, the then Chairman and Chief Executive of Petronas, on its behalf (para. 29).

6. The said Grant was executed in the form provided by the Schedule and pursuant to the provisions of ss. 2 and 4 of the Petroleum Development Act (para 30).

7. The grant, conveyance and vesting were declared in the said Grant to be irrevocable (para. 31).

8. Agreements and grants similar to that executed by the Terengganu State Government and referred to in paras. 23, 28 and 29 above were also executed by other State Governments under the Petroleum Development Act at around the same time (March 1975) or thereafter (para. 35).

9. The expression 'petroleum' used in the principal and supplementary agreements and in the grant referred to in para. 29 above bears the same meaning as that pleaded in para. 22 above (para. 38).

10. During the period March 1978 to November 1999, the Terengganu State Government was formed of members of the Barisan Nasional, with the said Dato Wan Mokhtar as Menteri Besar (para. 41).

11. During the said period the Federal Government was comprised of members of the Barisan Nasional, with Datuk Seri Dr Mahathir Mohammad as Prime Minister from April 1981 (para. 42).

12. The General Elections of November 1999 resulted in he coming into power of PAS which formed the Terengganu State Government, with Tuan Haji Abdul Hadi Awang being appointed the Menteri Besar (para. 43).

13. The Barisan Nasional was returned to power at the said General Elections at the federal level, with Datuk Seri Dr Mahathir continuing as Prime Minister (para. 44).

14. On 5 September 2000 the Federal Government, through its Ministry of Finance, issued a Press Release referring to a proposal to pay "wang ehsan" (para. 46).

15. By letter dated 4 October 2000, the State Secretary of the Terengganu State Government (Dato' Senara Muda) informed the President/Chief Executive Officer of Petronas (Tan Sri Hassan Marican) that the Terengganu State Government had not received any cash payment from Petronas in September 2000, and sought the same as soon as possible (para. 51).

16. To-date, Petronas has neither responded to the said letter of 4 October 2000 nor given any explanation for its failure to make the cash payment to the Terengganu State Government (para. 52).

Note:

The paragraph mentioned in each of the items, unless otherwise stated, refers to the paragraph in the statement of claim.

APPENDIX C

(pleaded facts which are imposed on the parties as undisputed, with or without variations or reservation)

1. All matters relating to land form part of the State List in the Ninth Schedule to the Federal Constitution. In consequence, the Terengganu State Government has exclusive jurisdiction to enact laws relating to all matters pertaining to land, while the Federal Government has no jurisdiction on such matters (para. 10).

2. In consequence of land rights being vested exclusively in the State of Terengganu (and not in any other authority), the entire ownership in respect of petroleum, and the exclusive rights, powers, liberties and priviliges of exploring, exploiting, winning and obtaining petroleum, whether onshore and offshore of the State of Terengganu, as part of such

land rights was at all material times vested exclusively in the State of Terengganu (and not in any other authority) (para. 11).

3. In consequence of the said vesting, by s. 8 of the said Act, the provisions of Petroleum Mining Act no longer apply to Petronas, and further by the provisions of s. 9 thereof, all licences issued under the Petroleum Mining Act would expire automatically six months from the date of the coming into force of the Petroleum Development Act. Petronas thus became the sole owner owning the entire ownership of petroleum in off-shore or on-shore lands and the sole authority to explore and exploit or to permit others to explore and exploit the same (para. 19).

4. By the provisions of ss. 2 and 4 of the Petroleum Development Act, 1974 in consideration of the vesting by the State Governments of Malaysia (including the Terengganu State Government) in Petronas of the entire ownership in, and the existing rights, power, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether on-shore or offshore of Malaysia, Petronas is by law and statute bound to make to the Federal Government and the Government of any relevant states such cash payments as may be agreed thereafter between the parties concerned (para. 20).

5. The main legislative policy and intent of the Petroleum Development Act is that it contemplated that, as a consideration for having vested the ownership of petroleum in Petronas, a sharing of cash payments from remuneration realized by sale of petroleum will take place between the Governments of the relevant states and Petronas, irrespective of the locations where petroleum is discovered, won and saved and for this purpose, the said Act provided for the execution of agreements between Petronas, of the one part, and the Federal Government or any relevant State Government, of the other part, relating to the quantum and manner of payment of the said cash payments (para. 21).

6. In consideration of Petronas agreeing to make cash payments to the Terengganu State Government under the principal agreement, the Terengganu State Government granted in perpetuity, conveyed to and vested in Petronas, the ownership in and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether lying onshore or offshore of Malaysia (including the State of Terengganu (para. 28).

7. By executing the principal agreement and issuing the grant pursuant to the provisions of the Petroleum Development Act, the Terengganu State

Government had freely and voluntarily relinquished to Petronas ownership of all petroleum/land rights (para. 32)

8. Such relinquishing of legislative and other powers over ownership of petroleum/land rights vested in the State of Terengganu from time immemorial and recognized in the Federal Constitution (as pleaded in paras. 5 and 9 above) was done in good faith and for valuable consideration, namely, the half yearly cash payments referred to in the Petroleum Development Act and the Principal Agreement (para 33).

9. It was not intended by any of the parties under the Petroleum Development Act and the principal agreement that ownership of petroleum/land rights would be so relinquished gratuitously or without compensation, that is, as a gift to Petronas (para. 34).

10. The cash payment made in March 2000 in the sum of RM434 million was in respect of production won and obtained in the second half of the year 1999. This sum was paid into the Terengganu State Consolidated Fund as part of the state revenue for the year 2000. This sum together with other revenue was expended in accordance with the provisions of the Supply (2000) Enactment, 1999, which allocated state expenditure for the year 2000. This Enactment came into force on 1 January 2000 (para. 40).

11. From about June 2000 media report suggested that the Prime Minister and the Federal Government were intending to cease cash payments to the Terengganu State Government (para. 45).

12. Despite failing to make the said cash payment, Petronas continues to win and obtain petroleum from the State of Terengganu pursuant to the Petroleum Development Act and under the Principal and Supplementary Agreements (para. 54).

13. Despite its failure to make the said cash payments to the Terengganu State Government, Petronas continued to make similar cash payments to other State Governments and in particular to the State Governments of Sabah and Sarawak under indentical or similar agreements executed under the Petroleum Development Act with the said State Governments (para. 56).

14. Instead, the Federal Government and/or the Prime Minister, purportedly exercising power and discretion under Section 3(2) of the Petroleum Development Act or otherwise, directed Petronas not to make the said cash payments to the Terengganu State Government (para. 63).

15. Petronas claiming that it was bound by such direction by reason of the provisions of s. 3(3) of the Petroleum Development Act or otherwise merely implemented the same (para. 64).

16. In any event, the Terengganu State Government contends that the Principal and Supplementary Agreements are "government contracts" within the meaning of public law (para. 78).

17. At all material times, the cash payment paid by Petronas to the Terengganu State Government represented between 75% to 80% of the total revenue earned each year by the Terengganu State Government (para. 82).

18. The scale of dependence by the Terengganu State Government on cash payment from petroleum won and obtained from Terengganu was a well known fact which the Federal Government and Petronas had actual or constructive knowledge of, including the fact that reference was made to it in Budget Speeches presented annually to the State Legislative Assembly of Terengganu during the relevant period (para. 83).

Notes:

1. Items 1 to 9 and 16 consist of statement of law on the Constitutions and the relevant statutes expressed in the form of opinion and some include facts. The opinions are to be left for argument and the facts, if still being disputed, may be determined under O. 33 r. 2. within the demarcation according to the contention of the respective party, that is to say, the defendants say, the plaintiff has no right to petroleum in the continental shelf and whereas the plaintiff asserts that it has such right irrespective of location.

2. In respect of item 10, it appears that the fact of payment is admitted. The rest of the pleaded facts in that paragraph, if still being disputed, may be determined under O. 33 r. 2.

3. With regard to items 11, 12, 13, 17 and 18 if the pleaded facts are still being disputed, they may be determined under O. 33 r. 2.

4. In the case of items 14 and 15, to the extent of what is admitted by the defendants.

APPENDIX D
(additional question of law)

Having regard to the first three questions, whether any or all of the other causes of action of the plaintiff are sustainable in law?